LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 29 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 347

AMERICAN LIFE AND ACCIDENT,
INSURANCE COMPANY OF KENTUCKY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

RICHARD A. CHENOWETH,
829 Second National Bldg.,
Akron, Ohio 44308,
Attorney for Petitioner
American Life and Accident
Insurance Company of Kentucky.

BUCKINGHAM, DOOLITTLE & BURROUGHS,
829 Second National Bldg.,
Akron, Ohio 44308,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

INDEX.

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 3

Reasons for Granting the Writ 8

Conclusion 11

Appendix:

Pertinent Portions of Statutes Cited 12

Order of the United States Court of Appeals for the Sixth Circuit 12

CITATIONS.

Cases.

NLRB vs. Metropolitan Life Insurance Co., 380 U. S. 438 8

Pittsburgh Plate Glass Co. vs. NLRB, 313 U. S. 146 10

Statutes.

National Labor Relations Act:

29 U. S. C. Section 159(c)(5) 2, 12

29 U. S. C. Section 160(b) 2, 12

29 U. S. C. Section 160(e) 2

28 U. S. C. Section 1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

AMERICAN LIFE AND ACCIDENT INSURANCE COMPANY OF KENTUCKY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on May 10, 1968.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board is reported at 158 NLRB 258. The Court of Appeals entered its Order without a written opinion in its Case No. 17,805, and at the time of printing hereof said Order has not been reported.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on May 10, 1968, and a copy thereof is appended to this Petition in the Appendix at pages 12-13. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 29 U. S. C. 160(e).

QUESTIONS PRESENTED.

1. Whether the National Labor Relations Board's Decision and Direction of Election holding that a combination of two of Petitioner's district sales offices constituted a unit appropriate for collective bargaining was controlled by the extent of the Union's organization of employees.

2. Whether the National Labor Relations Board's refusal to allow the Petitioner to present evidence at an unfair labor practice hearing regarding the Regional Director's bias and prejudice in finding an appropriate unit was a denial of due process of law and a denial of Petitioner's statutory right to hearing as guaranteed by Section 10(b) of the National Labor Relations Act.

STATUTES INVOLVED.

The pertinent portions of 61 Stat 144, 29 U. S. C. Section 159(c)(5), Section 9 (c)(5) of the National Labor Relations Act and 61 Stat 136, 29 U. S. C. Section 160(b), Section 10(b) of the National Labor Relations Act are set forth in the Appendix at page 12.

STATEMENT.

Petitioner employs debit agents who sell industrial life insurance out of 15 district offices located in Ohio and Kentucky. The Insurance Workers Union petitioned for an election among employees at Petitioner's 2 district offices in Cleveland. The evidence adduced at the representation hearing shows that the American Life & Accident Insurance Co. of Kentucky has from its inception been a small, closely-held family enterprise with all decision-making powers centered in the home office in Louisville, Kentucky. It has only fifteen offices located in Kentucky and Ohio. Dinwiddie Lampton, Jr., the only witness in the representation proceedings, is Petitioner's Vice President and principal administrative officer. He has more than thirty years' service and his father, the founder and president of the company, has more than sixty years' service (JA 45a). There are no other officers of the company and no employees comparable in service, experience, or power with regard to the company's affairs (JA 45a-46a). While the company's growth has necessitated some structural changes including the establishment of district offices, this has in no sense upset the centralization of power or the traditional means of doing business.

Crucial employment functions are handled solely by Mr. Lampton. For example, all applications for employment as debit agents are made on a standard form supplied by the home office (JA 52a-53a). The applications are sent into the home office to Mr. Lampton who initiates the necessary investigation of references and credits (JA 53a). He alone then approves or disapproves the application and makes the decision as to when and if the new employee goes to work (JA 53a).

Once the debit agent is employed in any district office, Mr. Lampton personally and through his Louisville staff makes a weekly check of the performance of such agent as well as all debit agents (JA 55a-56a). Debit agents and supervisory personnel continue in close personal contact with the home office through the constant availability of Mr. Lampton by telephone and through travel (JA 64a). Further, the performance of the debit agent is evaluated through the use of a pool of 50 employees, all highly skilled salesmen who are denominated "special men" and who are assigned directly from and by the home office to any district office for the purpose of assisting debit agents in solicitation of new business and collection of premiums (JA 58a). The home office's ability to maintain a constant analysis of each debit agent's performance and its corresponding ability to efficiently assign its special men is augmented by a female employee who compiles special information in the home office on selected agents (JA 56a). The procedure of general supervision from the home office is further aided by the use of an IBM computer (JA 105a).

Corporate financial affairs also reflect the centralized nature of Respondent's operations. All of Petitioner's books, accounts, and payrolls are opened and closed on the same day of the week throughout all the districts (JA 81a). While the debit agents turn in collections to the district office cashier, no books are kept at the district office, but rather all books and records are kept and posted in the home office (JA 75a). While it is traditional, both within the industry and the company, to pay debit agents on a commission basis, reasons for deviating from that rule, especially in the instance of older salesmen, may intervene and occasion a departure from the norm. In the event a decision is made to place a debit agent on salary, such decision is made exclusively in the home office (JA 80a).

When debit agents are paid, checks are drawn in the home office and signed by Mr. Lampton (JA 87a). The decision to pay or not to pay a debit agent on a voucher is made by Mr. Lampton (JA 56a). Decisions on the handling of claims are also made in the home office (JA 59a).

All elements of wages, hours and working conditions further reflect the centralized pattern set forth above. If an individual debit agent wants a change in the size or geographical limits of his business, Mr. Lampton makes the decision thereon (JA 84a). Vacation program are uniform throughout the company and Mr. Lampton alone authorizes the vacations (JA 101a). This decision further reflects the fact that he is the only person in the organization in a position to determine whether and when a man is available to fill the vacated slot (JA 100a-101a). Similarly, sick leave and sick pay benefits are company-wide and the debit of an agent on sick leave is serviced by an overhead man assigned by the home office (JA 91a-92a). Employee benefits are themselves uniform throughout the system.

Geographical considerations required the establishment of district offices. Otherwise, actual contact with policyholders and potential customers would be greatly reduced. Accordingly, eight district offices have been established in Kentucky and seven in Ohio, each district office being under the general direction of a district manager who, in turn, is directly responsible to the home office in Louisville (JA 46a). There are no intermediate levels between the district manager and the home office. Each of the managers has been an agent with the company and none have been hired from outside (JA 48a). All supervisory personnel are salesmen primarily and assist the debit agents in their selling functions (JA 46a-49a). In the Cleveland area, the largest city in which a district

office was established, growth necessitated the creation of a second Cleveland office in order to make administration more efficient (JA 50a-51a). Debit agents were thus able to stay closer to their territories and were able to cut down on their driving time (JA 51a). The branch offices do not correspond with the city limits of Cleveland, but extend beyond them as far as Elyria on the west and Alliance to the east (JA 94a). This is in keeping with Petitioner's general pattern of doing business, for there is as much business beyond the city boundaries as there is within them (JA 69a).

Termination of employment for any reason is only with the approval of Mr. Lampton, although generally he supports the judgment of his district manager (JA 54a-55a). Thus, from beginning to end of a debit agent's service, from the hiring to the firing, the close control of the home office is readily apparent.

Despite the above, the Regional Director erroneously found that "each district office is a complete, self-contained operating unit"; "that each office is in a large measure autonomous in its daily operations" and "the individual district office is in effect a separate administrative entity through which the employer conducts its business operations." He further found "that there is a substantial distance between the district offices involved here and the home office" despite the evidence of continual phone contact and personal visits. He concluded his finding by stating:

> "Therefore as the petitioner is seeking a unit comprising all of the employer's district offices in a separate and distinct geographic area in the city of Cleveland, Ohio, there is no history of collective bargaining and no union seeks a broader unit, I find such a unit

appropriate for purposes of collective bargaining." (JA 17a-20a.)

The Regional Director made his decision that the unit was appropriate without reading or considering Petitioner's Brief setting forth reasons why the unit was not appropriate for collective bargaining. The Petitioner subsequently refused to bargain with the Insurance Workers Union and the National Labor Relations Board issued its Complaint charging the Petitioner with violations of Sections 8(a)(1) and (5) of the National Labor Relations Act. The Petitioner filed an Answer admitting that it had refused to bargain with the Union and explained that said refusal was based upon the Regional Director's unlawful certification of the bargaining unit. The General Counsel of the National Labor Relations Board filed a Motion for a Summary Judgment on the pleadings and, in response to two orders to the Trial Examiner to show cause why the Motion for Summary Judgment should not be granted, the Petitioner expanded upon its Answer to the Complaint and stated that it intended upon the hearing on the Complaint to present evidence of the Regional Director's bias and prejudice in determining the unit to be appropriate without regard to the evidence presented at the representation hearing. Judgment against the Petitioner was granted on the pleadings by the Trial Examiner. The Petitioner excepted to the National Labor Relations Board and requested oral argument before the Board. The Board sustained the Trial Examiner and denied the Petitioner's request for oral argument. The Court of Appeals for the Sixth Circuit ordered enforcement of the Board's Orders.

REASONS FOR GRANTING THE WRIT.

The Board's Order in this case was made after the Supreme Court's judgment in *NLRB vs. Metropolitan Life Insurance Co.*, 380 U. S. 438. The Board's Decision in this case, which was written by its Regional Director, "articulates" reasons which purport to be factors supporting the determination that the combination of two district offices constitutes an appropriate bargaining unit. The Regional Director's reasoning recognizes only small portions of the evidence, and in some instances the evidence recognized is distorted from the record, in order to rationalize and reach the ultimate conclusion that each district office constitutes an independent administrative entity. However, when all the evidence is considered in context no reasonable mind could conclude that each district office was an independent administrative entity, but rather the only conclusion that can be rationally drawn is that the Petitioner's entire operations constitute a single administrative entity and the district offices are simply geographical extensions of Petitioner's principal office in Louisville, Kentucky.

Obviously the Board, in adopting the Regional Director's reasoning in this case after the Supreme Court had written its opinion in *NLRB vs. Metropolitan Life Insurance Company, supra,* has interpreted the *Metropolitan* opinion to mean that the Courts will not examine the record to determine whether the Board has exceeded the limitation imposed upon it by Congress in Section 9(c)(5) of the Act, that is, that the Board shall not find a bargaining unit appropriate where the extent of employee organization is the controlling factor. The Board interprets the *Metropolitan* opinion to mean that so long as it articulates any reason in addition to the extent of organization its findings will not be disturbed by the Courts regardless

of the fact that said articulated reasons may not be supported by evidence. The Supreme Court should grant certiorari herein to clearly require the Board to rely on reasons, in addition to extent of organization, which reasons are supported by evidence and not merely legal fictions to avert the intent of Congress.

Counsel for the Petitioner respectfully submits that an examination of the proceedings of the representation hearing will unequivocally demonstrate that the articulated conclusion that each of Petitioner's district offices constitutes an independent administrative entity is absolutely refuted by the evidence.

A further examination of the proceedings will demonstrate that the Board and its Regional Director had engaged in a policy to grant elections among insurance agents in any bargaining unit as petitioned, and that this policy was effectuated in this case without regard to the limitations of Section 9(c)(5) of the Act and Petitioner's procedural rights. The Regional Director made his determination that the unit was appropriate without reading Petitioner's Brief regarding the inappropriateness of the bargaining unit. In the subsequent unfair labor practice proceedings the Petitioner was denied a hearing and the opportunity to present evidence of the Regional Director's misconduct and existence of a policy disregarding the limitations imposed upon the Board by Section 9(c)(5) of the Act. In its pleadings and responses showing cause why it should have a hearing in the unfair labor practice proceedings, counsel for the Petitioner clearly stated that it did not wish to relitigate the issues considered in the representation hearing and counsel stated that it intended to present evidence of the Regional Director's misconduct, which evidence was of facts occurring after the representation hearing. Petitioner's right to a hearing on this

new matter was guaranteed by Congress in Section 10(b) of the Act wherein it is stated that: "* * * the persons so complained of shall have the right to * * * appear in person or otherwise to give testimony." The Supreme Court has previously held that a Respondent in an unfair labor practice proceeding is not entitled to a hearing where the Respondent intends only to relitigate issues that were fully litigated at a prior representation hearing. *Pittsburgh Plate Glass Co. vs. NLRB,* 313 U. S. 146. The Board has relied on this prior decision in denying the Petitioner a hearing in defense of the unfair labor practice charges because a prior representation hearing was involved; however, the Board has disregarded the fact that Respondent has sought to introduce evidence of the Regional Director's misconduct which obviously is new evidence and was not an issue at the prior representation hearing. While the Supreme Court's reasoning in the *Pittsburgh Plate Glass Co.* case is eminently clear, it should nevertheless review this case and correct the Board in its application of the case to the extent that it denies hearings where there is evidence not litigated in the prior representation case.

The flagrant disregard of the Regional Director and the Board of Petitioner's procedural rights demonstrate the arrogance of administrative power obtained through a vacuum created by lower courts that tend to accept the Board's decisions at face value. Counsel respectfully submits that if the Supreme Court is content to permit the Board to apply the *Metropolitan* opinion as though the Board is only required to articulate reasons without regard to supporting evidence, the Board will encroach upon Section 9(c)(5) of the Act, just as it has encroached upon the rationale of the Supreme Court's decision in the *Pittsburgh Plate Glass Co.* case, and will in fact find

appropriate bargaining units where the extent of employee organization is the controlling factor.

In both questions presented to the Supreme Court in this Petition for a Writ of Certiorari, the National Labor Relations Board has deliberately flaunted the authority of Congress and the decisions of the Supreme Court in applying both statutes and decisions as it desires rather than as intended by the Congress and the Supreme Court.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RICHARD A. CHENOWETH,
Attorney for Petitioner
American Life and Accident
Insurance Company of Kentucky.

BUCKINGHAM, DOOLITTLE & BURROUGHS,
829 Second National Building,
Akron, Ohio 44308,
Of Counsel.

APPENDIX.

PERTINENT PORTIONS OF STATUTES CITED.

61 Stat 144, 29 U. S. C. Section 159(c)(5), Section 9(c)(5) of the National Labor Relations Act:

"* * * In determining whether a unit is appropriate for the purposes specified in sub-section (b) of this Section the extent to which the employees have organized shall not be controlling."

61 Stat 136, 29 U. S. C. Section 160(b), Section 10(b), National Labor Relations Act:

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a Complaint stating the charges in that respect * * *. The person so complained of shall have the right to file an Answer to the original or amended Complaint and to appear in person or otherwise and give testimony at the place and time fixed in the Complaint."

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 10, 1968.)

Before: CELEBREZZE and MCCREE, *Circuit Judges*, and MCALLISTER, *Senior Circuit Judge*.

The National Labor Relations Board petitions this Court for enforcement of its order against American Life and Accident Insurance Company of Kentucky, Respondent. The Board found in a Decision and Order reported at 158 NLRB—(No. 31) (1966) that the Respondent violated

Section 8(a)(5) and (1) of the Act, 29 U. S. C. § 158(a)(5) and (1), by refusing to bargain with the certified bargaining representative of a group of its employees. Respondent does not contest the fact of its refusal to bargain but contends that the unit covered by the certification was inappropriate, and therefore it was under no legal duty to bargain.

The power of this Court to set aside the Board's determination of an appropriate bargaining unit is a narrow one, limited to a determination of whether the Board has violated the proscriptions of Section 9(c)(5), 29 U. S. C. § 159(c)(5), by giving controlling weight to the extent of organization or has otherwise abused its discretion. *Metropolitan Life Insurance Company v. National Labor Relations Board,* 330 F. 2d 62 (6th Cir. 1964) *vacated and remanded on other grounds* 380 U. S. 525 (1965). In the instant case the Board found that a grouping of Respondent's Cleveland 1 and 2 offices, the only offices in the City of Cleveland, was an appropriate bargaining unit. In his decision the Trial Examiner articulated several bases for his ruling. See *National Labor Relations Board v. Metropolitan Life Insurance Co.,* 380 U. S. 438, 443 n. 6 (1965). We cannot say that the Board gave controlling weight to the extent of union organization or otherwise abused its discretion.

Respondent's contention that it was denied due process we find to be without substance. It is therefore ORDERED that the petition of the National Labor Relations Board to enforce its order be, and it is, hereby granted.

ENTERED BY ORDER OF THE COURT,
CARL W. REUSS,
Clerk.